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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 657

FEDERAL RADIO COMMISSION, PETITIONER

v.

NELSON BROTHERS BOND & MORTGAGE COMPANY
(Station WIBO)

No. 658

FEDERAL RADIO COMMISSION, PETITIONER

v.

NORTH SHORE CHURCH (STATION WPCC)

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL RADIO COMMISSION

OPINIONS BELOW

The opinion of the court below (R. 1138–1142) and the dissenting opinion of Justice Groner in which Justice Hitz concurred (R. 1142–1147), are reported in 62 F.(2d) 854 (854–857; 857–860).

JURISDICTION

The decree of the court below reversing the order of the Federal Radio Commission was entered December 5, 1932 (R. 1148). The petition for writs of certiorari (Nos. 657 and 658) was filed February 2, 1933, and was granted March 13, 1933.[1]

The jurisdiction of this Court rests on Section 16 of the Radio Act of 1927, as amended by the Act of July 1, 1930, c. 788, 46 Stat. 844, and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (*infra*, p. 3, footnote 2).

QUESTIONS PRESENTED

The question principally presented is: (1) Whether the Davis Amendment (Section 9 of the Radio Act of 1927, as amended by Section 5 of the Act of March 28, 1928) authorized the Federal Radio Commission, when it found that the public interest would be served thereby, to grant the application of a broadcasting station located in an underquota State for the assignment to it of the facilities previously licensed to respondents' stations, located in a grossly overquota State, which were otherwise operating satisfactorily, for the purpose of improving and expanding the service of the applicant station and bringing about a greater degree of equality in the broadcasting facilities licensed in the two States.

[1] A concurrent petition, filed by Johnson-Kennedy Radio Corporation (Nos. 659 and 660), intervener in the court below, was also granted.

The Court may also wish to consider (2) Whether certain findings of the Commission are supported by substantial evidence, and (3) Whether this Court has jurisdiction to review a judgment of the Court of Appeals of the District of Columbia entered upon an appeal from an order of the Commission, taken pursuant to Section 16 of the Radio Act of 1927, as amended by the Act of July 1, 1930.[2]

STATUTE INVOLVED

The pertinent provisions of the Radio Act of 1927 (c. 169, 44 Stat. 1162), as amended by the Act of March 28, 1928 (c. 263, 45 Stat. 373), and as further amended by the Act of July 1, 1930 (c. 788, 46 Stat. 844), are set forth in Appendix A, *infra*, pp. 41–45.

STATEMENT

This Court granted writs of certiorari to review the judgment of the Court of Appeals of the District of Columbia (R. 1148) which set aside an order of the Federal Radio Commission granting the application of Station WJKS, located in Gary, Indiana, for a modification of its broadcasting license to permit it to operate full time on the frequency of 560 kc which was previously assigned to, and shared by, the respondents' stations, WIBO and WPCC, both located in Chicago, Illinois. Station WJKS, which previously operated part time

[2] This question is not discussed in this brief, but is treated in the "Reply Brief for the Petitioner" filed March 3, 1933, in answer to the respondents' brief in opposition.

on 1,360 kc, showed, among other things, that it required full-time operation, that the 1,360 kc frequency was subject to objectionable interference, and that the use of the 560 kc frequency would permit it to furnish satisfactory service. The State of Illinois now enjoys greatly in excess of, and the State of Indiana considerably less than, its fair share of the total broadcasting facilities assigned to Zone 4, as described by Section 2 of the Radio Act of 1927 (*infra,* Appendix A, p. 41), in which both States are located. The effect of the Commission's order, which contemplates the transfer of the 560 kc frequency from the respondents to Station WJKS, is to increase the total broadcasting facilities licensed to Indiana stations and to decrease the total of such facilities licensed to stations in Illinois, thus tending to carry out the mandate of Congress, contained in the Davis amendment, providing for a fair and equitable distribution of broadcasting facilities among the States in each zone.

Station WJKS is owned and operated by the Johnson-Kennedy Radio Corporation, petitioner in Nos. 659 and 660. At the time this proceeding was instituted it was licensed to operate 4/7 time on the frequency of 1,360 kc, sharing time with Station WGES of Chicago (R. 62). On September 26, 1930, it applied to the Commission for a modification of its license to permit it to operate full time on a frequency between 560 and 610 kc (R. 35–38). While this application was pending the

Commission issued its General Order 102 providing in part that (Appendix B, *infra*, p. 46):

> 2. Applications from under-quota states in zones which have already allocated to them their pro rata share of radio facilities should be for a facility already in use in that zone by an over-quota state.

Station WJKS then amended its application, asking for the assignment to it of the frequency of 560 kc then licensed to the respondent stations located in Illinois.[3] Zone 4, in which both Indiana and Illinois are located, is over quota, Indiana is grossly under quota, and Illinois considerably over quota (*infra*, p. 14). Pending consideration of the application of Station WJKS, respondents' licenses were renewed on a temporary basis and subject to any action that the Commission might take on the application of Station WJKS (R. 39, 41, 42–43).

After notice to interested parties (R. 43–49) a hearing on the application of Station WJKS was held before an examiner[4] (R. 50). On July 28, 1931, the examiner filed his report recommending that the application be denied (R. 1082). Excep-

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[3] Station WISJ, which shared time with respondents on the 560 kc frequency (R. 112), appears to have been previously assigned to a different frequency in another proceeding (R. 1091).

[4] In addition to oral testimony presented before the examiner, Station WJKS offered certain depositions (R. 662–732) which the Commission later held to be inadmissible (R. 1126). No reliance is placed upon them here.

tions to the examiner's report were filed by Station WJKS on August 14, 1931, copies being served on the interested parties (R. 1095–1123, 1124). On October 16, 1931, the Commission filed its Statement of Facts, Grounds for Decision, and Order, granting the application of Station WJKS (R. 1124–1131). The grounds of decision are as follows (R. 1130):

(1) The applicant station (WJKS) now renders an excellent public service in the Calumet region, and the granting of this application would enable that station to further extend and enlarge upon that service. (2) The deletion of Stations WIBO and WPCC would not deprive the persons within the service areas of those stations of any type of programs not now received from other stations. (3) Objectionable interference is now experienced within the service area of WJKS through the operation of other stations on the same and adjacent frequencies. (4) The granting of this application and deletion of Stations WIBO and WPCC would not increase interference within the good-service areas of any other stations. (5) The granting of this application and deletion of Stations WIBO and WPCC would work a more equitable distribution of broadcasting facilities within the Fourth Zone, in that there would be an increase in the radio broadcasting facilities of Indiana, which is now assigned less than its share of such facilities, and a decrease in the radio broadcasting facilities of Illinois, which is now assigned more than its

share of such facilities. (6) Public interest, convenience, and/or necessity would be served by the granting of this application.

From the Commission's order respondents appealed to the court below and Station WJKS intervened [5] (R. 1, 9, 17).

Station WJKS was built in 1926 to serve Gary, Indiana, and the surrounding area, known as the Calumet region, covering Laporte, Porter, and Lake Counties, in Indiana (R. 63, 77). The population of Gary is 110,000 and the Calumet region has a population of from 800,000 to one million, 90% of which is dependent on the steel industry for its livelihood (R. 63). Sixty percent of the population is foreign born (R. 63). The programs of Station WJKS are designed to meet the needs of the large foreign population (R. 63, 1126). At least one hour each day is allotted to foreign origin broadcasts for the Hungarian, Italian, Mexican, Spanish, German, Russian, Polish, Croatian, Lithuanian, Scotch, and Irish people, which are musical, educational, and instructive in their nature and stress loyalty to the community and to the nation (R. 64, 1126). These programs are arranged by cooperation with the social and civic leaders of the various nationalities, the talent being supplied locally (R. 64, 264–268). The purpose of these programs, for which no charge is made, and which

[5] Strawbridge and Clothier, which also intervened in the court below (R. 12), has been severed by order of the court below (R. 1155).

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are greatly appreciated and well received in the Calumet region, is to stimulate community and racial pride and to instruct in citizenship and American ideals (R. 64, 1126–1127). Time is regularly allotted for school programs (R. 66–87, 1127). These consist in part of performances by school bands, and debates and plays participated in by school children (R. 69, 70, 270–271). Good citizenship talks are broadcast weekly by judges and other civic leaders (R. 79, 1127). The "Learn to Speak English" program is a special feature sponsored with the cooperation of the teachers in the Gary schools (R. 69, 224–225, 262, 263). Special safety prevention talks are given for the workmen in the steel mills (R. 73, 269, 1127). The local police department is privileged to use the station (R. 73, 275). Sunday programs consist mainly of church service broadcasts, and include all churches and denominations in the community which desire to participate (R. 75–76, 1127). A chapel hour, conducted by different ministers, is broadcast daily at noon (R. 75). Community programs are presented by the various towns in the Calumet region, the purpose of Station WJKS being to serve the entire Calumet region (R. 78, 272). There is an outstanding invitation to every fraternal and charitable organization in the Calumet region to use the facilities of the station without cost, and such use is often made (R. 1127). No chain programs are broadcast by Station WJKS (R. 66).

Station WJKS expends $300 weekly for talent and its weekly expense for help averages $700 (R. 80, 1127). It employs from 15 to 25 persons, and its total cost of operations is approximately $35,000 per year (*Ibid*). The station represents an investment of approximately $75,000 (R. 1125). The Johnson-Kennedy Radio Corporation, which is engaged solely in operating the station, has paid-up capital stock of $30,000, of which Thomas J. Johnson, president, and his wife own 50% and Ralph Atlass, the treasurer, the remaining 50% (*Ibid*). No profits have been made in the past, and no salaries paid to officers, the operations being financed by the sale of time and by contributions from the personal funds of the stockholders (R. 80, 87, 99).

Station WJKS is the only station located in Gary, and no other station covers the same territory with the same type of programs (R. 69, 72, 79, 89). It now broadcasts from 7:00 to 8:30 A.M., 12:30 to 6:00 P.M., 7:30 to 9:00 P.M., and 10:30 P.M. to 12:00 midnight, and on four nights a week from 12:00 midnight to 4:00 A.M. (R. 94). Its application for full-time operation is founded upon an existing demand for additional programs of the character now broadcast by it (R. 69, 71, 90–91, 98). Since the steel mills operate on three shifts, 24 hours daily, there is a demand for service at almost all hours (R. 65). The purpose of Station WJKS is to extend the type of community service now rendered (R. 215, 216, 226, 1127).

It will sell sufficient time to make the station self-supporting and to improve its service (R. 215). If full-time operation is obtained, Station WJKS proposes to install new equipment, including double generators, which will permit continuous operation (R. 98).

Station WJKS introduced evidence before the Commission showing that it suffered objectionable interference on its present frequency of 1,360 kc, and also that such interference would not be likely to occur on the 560 kc frequency for which it applied. The Commission found that although Station WJKS delivers a signal of sufficient strength to give good reception in its normal service area, if not interfered with, heterodyne and cross-talk interference exists to within three miles of the transmitter, and constant objectionable interference is found in the good service area of the station, particularly to the south, southeast and east (R. 1127–1128). During the last two years the amount of interference experienced has increased and complaints of such interference have been constantly received by the station (R. 1128). The Commission found also that Station WIBO, now operating about 30 miles from Gary on the frequency requested by Station WJKS, is heard clearly in that city without interference of any nature, and that the operation of Station WJKS on 560 kc and the deletion of Stations WIBO and WPCC would not be expected to increase interference with the service of any other station (R. 1128). It found that

WJKS employed a composite transmitter, capable of 100% modulation, and that its equipment was in good mechanical and electrical condition (R. 1127).

Station WIBO is owned and operated by the respondent Nelson Brothers Bond & Mortgage Corporation, which operates the station separately from the first mortgage real-estate business, in which it is principally engaged (R. 397–398, 1128). Prior to this proceeding Station WIBO was licensed by the Commission to operate on 560 kc, sharing time with Station WPCC, which was allotted 12 hours on Sunday only, Station WIBO enjoying the remaining time (R. 137, 1128). By agreement between the two stations, Station WPCC granted certain of its Sunday hours to station WIBO in exchange for week-day hours (R. 1128).

Station WIBO is affiliated with, or maintains arrangements, with the Chicago Evening American, an afternoon newspaper published in Chicago, the Publix-Balaban & Katz Motion Picture Theatres, and the National Broadcasting Company.

The Evening American supplies the station with market reports, news bulletins and talks by specialists on the staff of the newspaper, on foods, interior decoration, etc. (R. 186–190). In return the station announces over the air practically every half hour that it is affiliated with the Evening American, "the most widely read Chicago afternoon newspaper" (R. 186, 193). Service similar to that supplied over Station WIBO by the Evening

American is furnished over other Chicago stations by other newspapers (R. 206, 207). Of the twenty or more stations in Chicago, five are affiliated with the principal newspapers in the city (R. 341–342). The Chicago Herald-Examiner, which is, like the Evening American, a Hearst newspaper, but published in the morning, operates Station KYW in Chicago (R. 199, 203).

By arrangement with the Publix-Balaban & Katz theatres, announcements with respect to current motion pictures are made over Station WIBO which, in return, enjoys the privilege of broadcasting stage programs from the theatres (R. 340, 341).

By virtue of its affiliation with the National Broadcasting System, Station WIBO broadcasts five hours and eighteen minutes out of a total of 17 hours and 45 minutes of National Broadcasting chain programs broadcast daily in Chicago (R. 373–374). The National Broadcasting Company has under lease in Chicago, Station WENR, a 50-kilowatt, full time, clear channel station (R. 361). Station KYW, a 10-kilowatt, full time, clear channel station in Chicago, also carries National Broadcasting programs (R. 362). If Station WIBO goes off the air there will remain many other stations, each covering the same area as Station WIBO, or a greater area, over which the National Broadcasting programs might be broadcast (R. 108–109, 136, 376). The Commission accordingly found (R. 1129):

> The programs broadcast by WIBO include a large number of chain programs originating in the National Broadcasting network and are almost entirely commercial in their nature. The same general type of programs broadcast by WIBO, including National Broadcasting chain programs are received in the service area of WIBO from many other stations located in the Chicago district.

Station WIBO, which has been operating since 1925, represents a total cost of $346,362, less a reserve for depreciation of $54,627 (R. 1128). It employs 55 persons, its total monthly expenses averaging $17,000 (R. 1128). During the month of March 1931 it earned a net profit of $9,000 (R. 1128).

Station WPCC is owned and operated by the respondent, North Shore Church (R. 137). It broadcasts approximately 8 hours each week, its programs being made up entirely of sermons, religious music and talks relating to the work and interests of the church (R. 1129). Contributions are solicited over the station for the use of the church and the advancement of the matters in which it is interested (R. 1129). When the Reverend J. C. O'Hair became pastor of the church, it was very much in debt (R. 139). It then commenced to broadcast over the radio, as a result of which its audiences were more than trebled, and its budget increased two or threefold (R. 139). The pastor is general manager of the station and

devotes the greater portion of his time to its operation and maintenance (R. 136, 156, 1129). There was evidence from which the Commission found that there were other stations operating in the service area of WPCC, including Station WMBI, owned and operated by the Moody Bible Institute, which devote more time to programs of a religious nature than does Station WPCC (R. 143, 184, 1129).

In order to comply with the equalization provisions of the Davis Amendment of 1928, the Commission has fixed unit values for radio broadcasting stations of various classes, powers and time of operation (General Order 92, R. 1069–1072). The maximum number of units available for the entire United States is 400, or 80 for each zone. The number of units due each state within each zone is determined, as provided in the Davis Amendment, according to population. The Commission found [6] (R. 1129):

> The State of Indiana is 2.08 units or 22 per cent under-quota in station assignments and the State of Illinois is 12.49 units or 55 per cent over-quota in such assignments. The Fourth Zone, in which both states are located, is 21.00 units or 26 per cent over-quota in station assignments. The granting of this application and deletion of

[6] The testimony, which varied slightly from the finding of the Commission, was that assignments in Illinois exceeded its quota of 22.5 units by 11.15 units, or 49%, and that Indiana, which is entitled to 9.53 units, is lacking 1.95 units, or 20% of its quota (R. 108, 111, 113).

> WIBO and WPCC would reduce the over-quota status of the State of Illinois and the Fourth Zone by 0.88 unit and 0.45 unit respectively, and would increase the quota of Indiana by 0.43 unit.

It thus appears that the broadcasting facilities assigned to Illinois in excess of its quota have a greater unit value than the total of such facilities licensed in Indiana.

In reversing the order of the Commission the court below said (R. 1141–1142):

> Station WIBO had been broadcasting for more than two years, and Station WPCC more than three years, when Station WJKS entered the field. The only apparent reason for granting the application of Station WJKS and destroying the other two stations is that Indiana is underquota, which in the circumstances furnishes no substantial justification for the decision of the commission. As already observed, the evidence discloses that Station WIBO and WPCC have been and are "serving public interest, convenience, and necessity" certainly to as great an extent as the applicant station. In our view, the conclusively established and admitted facts furnish no legal basis for the decision of the commission. In other words, the decision is in a legal sense arbitrary and capricious.

The dissenting opinion of Justice Groner, in which Justice Hitz concurred, states in part (R. 1146):

> Epitomized, therefore, the evidence shows that all three stations concerned are now rendering satisfactory service, but that operation of the two Chicago stations may be terminated without detriment to the public interest, and that the service of the Indiana station may be improved and extended in the public interest by granting to it the facilities now enjoyed by the other two. Coupled with this is the fact that the Chicago stations are located in an over-quota State and the Indiana station in an under-quota State. More than this is unnecessary if the intent of Congress, as expressed in the amendment, is to be given effect, * * *.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the Federal Radio Commission does not have the authority, under the Act of March 28, 1928, c. 263, 45 Stat. 373, in the exercise of its licensing power to lessen the gross disparity existing between the broadcasting facilities of two States by granting a license to use the frequency assigned to the respondents, located in the over-quota State, to an applicant for such frequency in the under-quota State and declining to grant the license to respondents.

2. In holding that the action of the Commission was an arbitrary and capricious exercise of power.

3. In relying upon a finding of the examiner that the service of the applicant station would be im-

proved by the installation of the most modern radio equipment and its operation in the most efficient manner on its present frequency, which finding was inconsistent with findings of the Commission, supported by substantial evidence.

4. In relying upon a finding of the examiner that more objectionable interference would result from the operation of the applicant station on the 560 kc frequency than now results from its operation on the 1,360 kc channel, which finding was inconsistent with the findings of the Commission, supported by substantial evidence.

5. In holding that the Federal Radio Commission erroneously determined that the public interest, convenience, or necessity would be served by the transfer to the applicant of the frequency assigned to the respondents.

6. In reversing the order of the Commission.

SUMMARY OF ARGUMENT

I. Section 9 of the Radio Act of 1927, as amended by Section 5 of the Act of March 28, 1928, known as the Davis Amendment, authorizes the Commission to grant broadcasting licenses if the public interest, convenience, or necessity will be served thereby, and requires the Commission simultaneously to make, as nearly as possible, an equal allocation of broadcasting facilities to the zones, and a fair and equitable distribution among the states in each zone.

The Commission in this case found that Station WJKS, located in Indiana, experienced objectionable interference on its present frequency, and that a change in its frequency would permit it to improve and extend its service. It found on the other hand that the programs broadcast by respondents' stations, located in Chicago, merely duplicated the type of programs furnished by many other stations in the Chicago area. It found also that Illinois had 55% in excess of its quota, and Indiana 20% less than its fair share of broadcasting facilities. The evidence clearly sustains the conclusion of the Commission that the granting of the application of Station WJKS for the facilities previously licensed to respondents, was in the public interest and was authorized by the express provisions of the Davis Amendment.

A contrary conclusion is possible only if Congress did not intend that the Davis Amendment should be applied where an existing station otherwise performing satisfactory service would be adversely affected thereby. This is apparently what the court below intended to hold when it stated that the decision of the Commission in this case was "in a legal sense arbitrary and capricious."

But if Congress intended the Davis Amendment to be thus limited it would have so provided. Its legislative history shows conclusively the intent of Congress that, where such action would be in the public interest and is necessary to bring about the

fair and equitable distribution among the states provided for in the Davis Amendment, the Commission should decline to renew the licenses of existing stations, even through they may otherwise be operating satisfactorily.

The Davis Amendment as construed by the Commission does not impair the constitutional rights of respondents. The owner of a broadcasting station possesses no vested right to continue to operate, which is superior to the federal regulatory power. *Trinity Methodist Church, South* v. *Federal Radio Commission,* 62 F. (2d) 850; certiorari denied, January 16, 1933; *KFKB Broadcasting Association* v. *Federal Radio Commission,* 47 F. (2d) 670; *City of New York* v. *Federal Radio Commission,* 36 F. (2d) 115; *Technical Radio Laboratory* v. *Federal Radio Commission,* 36 F. (2d) 111.

Paragraph 2 of the Commission's General Order 102, pursuant to which Station WJKS applied for the facilities previously licensed to respondents, is valid.

II. In granting the application of Station WJKS, the Commission concluded that that station was experiencing objectionable interference upon its existing frequency; that by the change in frequency it would be enabled to extend and improve its service; and that interference within the good service area of other stations would not be increased by the change. It is not clear whether the court below accepted these conclusions of the

Commission as final. It referred in its opinion to certain findings of the examiner which were not approved by the Commission and are inconsistent with the Commission's findings. The findings made by the Commission are amply supported by the evidence.

ARGUMENT

I

THE PROVISIONS OF THE DAVIS AMENDMENT CLEARLY AUTHORIZED THE ACTION OF THE COMMISSION

The validity of the Commission's order turns on the proper application of Section 5 of the Act of March 28, 1928, known as the Davis Amendment.

Section 9 of the Radio Act of 1927, as modified by the Davis Amendment (*infra,* pp. 42–43), authorizes the Commission to issue broadcasting licenses when "public convenience, interest, or necessity" will be served thereby, and provides that the Commission shall as nearly as possible make and maintain an equal allocation of broadcasting facilities to each of the zones established by the Act,

> and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States * * * within each zone, according to population.

The Commission is directed to carry into effect "the equality of broadcasting service hereinbefore directed", whenever necessary or proper, among

other ways, by the granting or refusing of licenses or of renewals of licenses.

Section 16 of the Radio Act of 1927 as amended by the Act of July 1, 1930[7] (*infra*, p. 45) limits review of the decisions of the Commission by the court below to questions of law, and provides that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive "unless it shall clearly appear" that they are arbitrary or capricious.

The court below held that the decision of the Commission was "in a legal sense arbitrary and capricious." The Commission's findings are amply supported by the evidence, and its order seems clearly justified by its grounds for decision. (*Supra*, pp. 6–7.) It is believed, therefore, that the basis of the court's decision is that the Davis Amendment, despite its express direction to the Commission to make a fair and equitable allocation of facilities to each of the states, is not to be applied where an existing station, otherwise rendering satisfactory service, will be adversely affected thereby. This conclusion, we think, is not only contrary to the unambiguous language of the statute, but ignores entirely its legislative history and purpose.

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[7]As originally enacted, Section 16 empowered the court below to "alter or revise the decision appealed and enter such judgment as to it may seem just." See *Federal Radio Commission* v. *General Electric Company*, 281 U.S. 464.

The voluminous record contains an abundance of evidence as to the character of the Calumet region served by Station WJKS, the character of service rendered by that station (which was found to be peculiarly adapted to the interests of the population for which it is intended), the need of Station WJKS for additional time (*supra,* pp. 7–10), and the objectionable interference existing within its service area on its present frequency (*infra,* pp. 34–40). On the other hand, there was detailed evidence (*supra,* pp. 11–14) amply supporting the Commission's findings that respondents' stations merely duplicate the types of programs received in the Chicago area from many other stations (R. 1129, 1130).[8]

The record also shows that there are many stations serving the Chicago district, and that there are five such stations with power of 20 kilowatts or more (R. 108–109). While the population of Indiana is practically equal to that of the City of

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[8] The assertion of the court below (R. 1142) that "the evidence discloses that Stations WIBO and WPCC have been and are 'serving public interest, convenience, and necessity' certainly to as great an extent as the applicant station," is not merely a substitution of its judgment for that of the Commission, but is also manifestly incorrect. As the Commission has said (Annual Report, 1928, pp. 169–170): "the test—'public interest, convenience, or necessity'—becomes a matter of a comparative and not an absolute standard when applied to broadcasting stations. * * * The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not * * * of the individual broadcaster or the advertiser."

Chicago, the combined power of all the stations in Indiana, 15 in number, is less than 15 kilowatts. (R. 91, 92). The Commission found (*supra*, p. 14) that Illinois has 55% in excess of its fair share of broadcasting facilities, whereas Indiana is 20% below its quota. The fact, adverted to by the court below (R. 1141), that Gary and the surrounding area are within the range of programs broadcast by the Chicago stations would have greater significance if the quota disparity between the two states were not so great. Moreover, the particular objective of the Davis Amendment was that each state should have its own broadcasting facilities to serve its own peculiar interests and needs (*infra*, pp. 26–27). The justification for this Congressional policy can be no better exemplified than by the instant case, for none of the numerous Chicago stations provides the Calumet region with the local service provided by Station WJKS, which the Commission found should be extended and improved (*supra*, p. 9).

It seems clear, therefore, that a proper application of the Davis Amendment, not only justified, but compelled the Commission's decision. A contrary conclusion can be reached only if it be held that the Davis Amendment is under no circumstances to be applied where an existing station, not otherwise subject to criticism, will be affected thereby. But such a construction would render the Davis Amendment practically ineffective, for

it would then apply only if facilities are voluntarily relinquished or a license is refused or revoked because a station is found to be violating the terms of its license or otherwise misusing its privilege. If Congress intended thus to limit the application of the Davis Amendment it would have so provided.

A review of the legislative history of the Davis Amendment leaves no doubt that the order of the Commission complies with the precise intention of Congress. Radio broadcasting on a commercial scale was fairly developed before the Radio Act of 1927 was passed. The licensing provisions of the earlier Radio Act of 1912 (c. 287, 37 Stat. 302, U.S.C., Title 47, Sec. 51 *et seq.*) were interpreted by the Acting Attorney General, in an opinion rendered July 9, 1926, as amounting to little more than a registration requirement, the Secretary of Commerce having no authority to refuse a license or to restrict the frequency, power, or hours of operation of a radio station. (See 35 Ops. A.G. 126.) Consequently, many more stations were erected than could be accommodated on the wave lengths available for broadcasting purposes, and large numbers of these stations became concentrated in particular areas. The aftermath of this opinion is stated in the report of the committee on radio law of the American Bar Association, submitted to the 1929 annual meeting of the Association. It stated: [9]

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[9] Report of 52d Annual Meeting of American Bar Association, p. 442.

> In the period which intervened between July 9, 1926, and the enactment of the Radio Act of 1927 on February 23, 1927, nearly 200 new broadcasting stations came into existence, bringing the total up to 733. These new stations selected such frequencies as they chose without regard to interference or the rights of either American or Canadian stations. Existing stations which were dissatisfied "jumped" to other frequencies and increased their power and hours of operation at will. The result was a chaos which will long be remembered in the radio world as the "breakdown of the law," in which radio reception was virtually ruined.

Congressman White, upon the submission to the House in March 1926 of the committee report on the White Bill, which in slightly amended form became the Radio Act of 1927, called attention to a national radio conference held in Washington in 1925, and stated that the pending bill was the committee's response to the suggestions for legislation adopted by the conference (Cong. Rec., Vol. 67, Pt. 5, p. 5478). He stated (p. 5479):

> It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations, and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee.

With reference to the evils which the proposed bill was designed to remedy, he said (*ibid*, p. 5480):

> We do assert that the difficulties which confront us, the congestion which exists, the unwarranted grouping of stations, the complaints arising from the distribution of wave lengths and from the use of power are inevitable under existing law, which gives no powers commensurate with the problem.

The Radio Act of 1927, passed on February 27, vested control of radio broadcasting in the Federal Radio Commission under a licensing system. Section 9 of the Act authorized the granting of licenses "if public convenience, interest, or necessity will be served thereby", and provided further that (*infra*, p. 43, footnote):

> In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as *to give fair, efficient, and equitable radio service* to each of the same. * * *

The Davis Amendment, enacted one year later, resulted from the dissatisfaction of Congress with the Commission's application of this paragraph of Section 9. Congressman McKeown, a member of the House Committee in charge of the bill which became the Act of March 28, 1928, urging the enact-

ment of that provision, said (Cong. Rec., Vol. 69, Pt. 4, p. 4489):

> The Commission has construed an equitable distribution to mean from the standpoint of the listener. If he can have a receiver in Arizona that can hear New York, that is enough for him, and they say that is a fair and equitable distribution. * * * We are asking to pass this legislation so that the Commission will not do as it has in the past, ignore all the rest of the country and let the few stations in New York and Chicago dominate the whole broadcasting country.

The object of the proposed amendment is more fully discussed in the report of the House Committee, which states in part (H.R. 800, Seventieth Congress, 1st Session, pp. 3–4):

> * * * Prior to the present radio law there was no authority to control the location of stations. It does no violence to truth to say that prior to March 1927, stations were built whenever and wherever applicants desired and that there was no legal power to control either the use of wave lengths or power. The present commission on its assumption of authority found conditions not much different than they now are. *Is is perhaps idle to consider whether the commission during the past year could or should have brought about a redistribution. This amendment looks to the future.* It declares in terms the duty of the licensing authority to make an equal allocation among the five zones, of broadcasting licenses, of wave

> lengths, and of station power and provides that within each zone there shall be an equitable allocation among the States thereof in proportion to population and power. * * * It does not suggest that the requirement of the law of a showing of public interest, convenience or necessity as the basis for the grant of a license, or that other provisions of the law are to be waived. It is intended, however, to require of the licensing authority that as soon as may be and in proper cases licenses in number and in kind shall be granted to applicants from this third zone and other sections of the country sufficient to bring equality in the particulars specified. *If, however, within the entire United States the saturation point is now reached and additional stations or additional power or other wave lengths may not be granted in a particular zone without prejudice to all, then it necessarily follows that there must be worked out a redistribution of the stations and of the power and of wave lengths now authorized.* (Italics ours.)

The same report refers earlier (p. 1) to a proposal to reduce the maximum term of broadcasting licenses from the three-year period authorized in Section 9 of the Radio Act of 1927, to three months (enacted in Section 3 of the Act of March 28, 1928, (c. 263, 45 Stat. 373) because, "It was felt that during the period in which the licensing authority was endeavoring to effect a more ordered system and more equitable service throughout the country,

short-time licenses would make it easier to work out advisable adjustments."

There can thus be no question of the intent of Congress that, where necessary to bring about the equitable distribution facilities provided for in the Davis Amendment, the Commission should decline to renew the licenses of existing stations, even though they might otherwise be operating in the public interest.

There can be no question of the constitutional power of Congress to bring about the equitable distribution of facilities required by the Davis Amendment. It will hardly be urged that the standard adopted—fair and equitable treatment of each of the States according to population—is arbitrary or otherwise unlawful. The fact that the application of this standard may force respondents' stations off the air does not, without more, indicate that their constitutional rights have been impaired. The court below has held on several occasions that a broadcasting station enjoys no vested right to continue to operate, which is superior to the regulatory power of Congress. *Trinity Methodist Church, South* v. *Federal Radio Commission,* 62 F. (2d) 850, certiorari denied, January 16, 1933; *KFKB Broadcasting Association* v. *Federal Radio Commission,* 47 F. (2d) 670; *City of New York* v. *Federal Radio Commission,* 36 F. (2d) 115, certiorari denied, 281 U. S. 729; *Technical Radio Laboratory* v. *Federal Radio Commission,* 36 F. (2d)

111. The Circuit Court of Appeals for the Seventh Circuit has reached the same conclusion. *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, certiorari denied, 285 U. S. 538. In the *Trinity Church case,* the court below said (p. 853):

> Nor are we any more impressed with the argument that the refusal to renew a license is a taking of property within the Fifth Amendment. There is a marked difference between the destruction of physical property, as in *Penna. Coal Co.* v. *Mahon,* 260 U.S. 393, and the denial of a permit to use the limited channels of the air. As was pointed out in *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, 320, the former is vested, the latter permissive, and, as was said by the Supreme Court in *C., B. & Q. Ry. Co.* v. *Illinois,* 200 U.S. 561, 593: "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury does not attach under the Constitution." When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether the restrictive measures are reasonably adapted to secure the purposes and objects of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not

an unconstitutional taking of property without compensation or without due process of law." (*Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U.S. 548, 558.)

These conclusions find ample support in many decisions of this Court sustaining the plenary power of Congress over interstate commerce. See Government's brief in *White* v. *Johnson,* 282 U.S. 367.

Respondents urged in the court below that even if the Commission had properly construed the Davis Amendment, the regulation of the Commission pursuant to which Station WJKS applied for the facilities previously licensed to respondents, was invalid. That regulation is embodied in paragraph 2 of the Commission's General Order 102 (Appendix B, *infra,* p. 46) which requires an applicant for facilities in an under-quota state in an over-quota zone to apply for facilities already in use in an over-quota state in that zone. Respondents did not question the propriety of limiting an applicant in an over-quota zone to apply for facilities already in use in an over-quota state in that zone. Their contention was that the effect of the regulation is to delegate to Station WJKS the selection of the facilities which should be assigned to it.

This contention is founded upon a misconstruction of the meaning and effect of General Order 102. Its object is merely to require the applicant

to indicate specifically the facilities to which it believes it is entitled; it is not intended to, and does not in any way, prejudice the station to which those facilities are then licensed. In *Chicago Federation of Labor* v. *Federal Radio Commission,* 41 F. (2d) 422, decided before General Order 102 was adopted, the Court of Appeals considered an earlier but somewhat similar practice of the Commission, saying (p. 423):

> Under section 4 (f) of the Radio Act of 1927 (47 U.S.C.A., Sec. 84 (f)), the Commission is authorized to make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of the act. It is necessary that when a broadcasting station applies for the assignment of some other frequency to take the place of that already allotted to it, the station shall first determine what frequency it desires to apply for, and shall specify it in its application, in order that the Commission may be advised of the exact force and effect of the application.

There is nothing, however, in the fact that the applicant is required to specify the facilities which it desires, which indicates that the respondent may not defend on the ground that facilities other than its own should be granted to the applicant. Thus there was nothing to prevent respondents in this case from raising the question that other stations in over-quota states in the Fourth Zone, employing

facilities which Station WJKS could use, were being operated less in the public interest than their stations. In order to sustain its claim to the facilities licensed to respondents, Station WJKS would then have had to show the contrary. But respondents did not raise this question before the Commission. They made no request that any other stations should be made parties. There is nothing to indicate, therefore, that they have been prejudiced by the operation of General Order 102.

The validity of General Order 102 has been sustained where the applicant has appealed. *Durham Life Insurance Company* v. *Federal Radio Commission,* 55 F. (2d) 537.

General Order 102 is designed not merely to define the issues before the Commission and to provide for an orderly procedure. It imposes upon the applicant the burden of showing not only its own necessities but that they are more important in the public interest than the continuance of another's license. The others may no doubt defend upon the ground that the public interest will be better served by the refusal of some other license. There is no injustice in this and the practice adopted avoids the initial necessity of making all stations in over-quota States parties to every hearing on an application for facilities from an under-quota state. It would be practically impossible, on account of the multiplicity of parties, the time required, and the size of the record which would be made, for the Commission to carry on its work if such procedure

were required. Congress must have "intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed." *New England Divisions Case,* 261 U.S. 184, 197.

II

THE FINDINGS OF THE COMMISSION WITH REFERENCE TO INTERFERENCE CONDITIONS ARE AMPLY SUPPORTED BY THE EVIDENCE

The Commission, in granting the application of Station WJKS, concluded that the station was experiencing objectionable interference upon its existing frequency; that by the change in frequency it would be enabled to extend and improve its service, and that interference within the good service areas of other stations would not be increased by the change (*supra,* p. 6).

It is not clear whether the court below accepted these conclusions as final. It referred in its opinion (R. 1138) to certain findings of the examiner, not approved by the Commission and inconsistent with the Commission's findings (*supra,* pp. 10–11). The Commission's findings are adequately supported by evidence, and should have been accepted as conclusive.

The evidence clearly establishes that there was objectionable interference on the applicant's assigned frequency of 1,360 kc. Reception of the applicant's programs was poor, due to noise, hum, and cross-talk (R. 63, 67, 72). Complaints have been received from people within 6 or 7 miles of the

transmitter that the station could not be heard (R. 72). The worst interference was encountered in the south, southwest, and east (R. 69). The call letters of a Syracuse station had been heard during the applicant's broadcasting time (R. 68, 218). Interference was noted within a radius of 3, 6, 8, and 10 miles of the transmitter (R. 71, 218). An engineer with the Federal Radio Commission testified that a 1,000-watt station should furnish excellent city service to an area of about 9 miles, and that it should give good residential service within a 35-mile area (R. 117). His estimate of good service area was based on a field intensity of 2 millivolts, or 2,000 microvolts, per meter (R. 122).

The applicant's consulting engineer made field observations on April 20 and 21, 1931, within a radius of approximately 30 miles of WJKS' transmitter (R. 159). These observations were made with a field intensity measuring set and consisted of two distinct observations (R. 159). One observation was made about 30 miles south of WJKS, at which point the station's signal was about 1.8 millivolts per meter (R. 159). There was audible interference at this point, which was definitely disturbing and detrimental to good reception (R. 159). Another observation was made 30 miles southeast of WJKS, the signal at that point being 3 millivolts per meter (R. 159). The interference at that point was also capable of being measured and appeared to be coming at right angles from a line from which the signal from WJKS was coming

(R. 159). The interference measured 0.2 millivolt per meter and was in the nature of a beat note which was quite loud and very annoying (R. 159). The interfering beat note had a frequency of 100 cycles per second and affected speech and announcements to a greater extent than music (R. 159). A third observation was made 30 miles east of WJKS. The signal at this point was almost indistinguishable, due to interference (R. 159). Measurement at this point revealed that the combined level of the WJKS signal and the interference was about 1½ millivolts per meter (R. 159). At this point there was a 100-cycle per second beat note from an unidentified station and also a low flutter in the reception of WJKS of about 10 cycles per second. This interference, the engineer testified, was from another station operating on almost exactly the same frequency (R. 160). The engineer described a 100-cycle per second beat note as a constant tone which would correspond to about 100 cycles per second (R. 160). He stated that with good receivers, beat notes from about 10,000 cycles on down to practically zero were perceptible to the ear and were objectionable (R. 160). On most receivers 50-cycle sounds might not be transmitted to the ear due to deficiency in the receiver (R. 160). Interfering sounds from about 75 cycles to 3,000 cycles would greatly disturb the reception of speech, while higher frequency sounds would disturb both speech and certain types of music (R. 161).

The engineer stated that in his opinion there was sufficient signal strength from WJKS to give good reception were interference not present, but that, in his opinion, there was objectionable interference (R. 162). This is supported by the statement of the Commission's engineer who said that, assuming a field intensity of 2 millivolts per meter, a 1,000-watt station should have a good service area of approximately 35 miles (*supra*, p. 35).

This witness also testified that for over a year at his home in Chicago, 30 or 35 miles from WJKS, he had intermittently observed the operations of WJKS (R. 134). At various times the signal was too poor to give good service, not from a signal strength standpoint but due to heterodyne, usually of from 100 to 200 cycles per second, which made it rather objectionable to listen to (R. 134). On March 4 and 5, he made two observations for the specific purpose of determining the extent of the heterodyne and found it on those occasions to be extremely bad (R. 134). In his opinion the heterodyne was caused by another radio station (R. 134–135).

The applicant's engineer testified further that he had made an examination of the transmitter of WJKS on March 5, 1931, and found it to be an average and typical composite transmitter consisting of a crystal controlled apparatus with the usual and necessary intermediate amplifier stages (R. 133, 134). Low level modulation was employed, and the apparatus was so arranged as to produce a high

percentage of modulation (R. 134, 158). The equipment, he stated, was in good mechanical condition, and appeared to be in good electrical condition (R. 134). He stated that he had examined the equipment of WIBO approximately a year and a half before the hearing, and that it also used an average composite transmitter (R. 179). Its towers were of the same general type as those of WJKS (R. 179).

He concluded, on the basis of the examination he had made, that WJKS was efficient and that it was probably radiating substantially 1,000 watts power (R. 179).

The applicant also introduced testimony showing that the objectionable interference which it encountered on its present frequency of 1,360 kc would not exist if it were permitted to broadcast on the 560 kc frequency. Although respondents' stations were located 30 or 40 miles from Gary, their reception in that area on the lower frequency was clear while that of the applicant was not (R. 68, 95). The applicant's engineer also testified that, based upon his reception of the stations in Chicago, he would not expect WJKS to get interference if it were operating on 560 kc (R. 163, 167–168). The manager of Station WIBO stated that its reception was perfectly satisfactory (R. 357). There was also testimony showing that the lower frequency, 560 kc, was more desirable for local service than the frequency used by the applicant (R. 223, 232). An engineer of the Federal

Radio Commission stated that if the purpose of a station was to serve an immediate compact area, it was more likely that it could do so on a low frequency than on a high frequency (R. 125).

The Commission found that the operation of Station WJKS on the frequency of 560 kc would not be expected to increase interference with the service of any other stations (R. 1128). This finding was supported by the testimony of the Commission's engineer, who stated that local conditions would probably have more effect upon other stations on the main channel and adjacent channels than the short change in actual mileage from Chicago to Gary (R. 119, 123). The finding was also supported by the evidence that the reception on the 560 kc frequency in Gary was free from interference (*supra,* p. 38). Respondent's engineer stated that before expressing an opinion as to whether WJKS would encounter interference from or would create interference with other stations on the 560 kc frequency, he would want to listen carefully on that frequency in and around Gary (R. 320).

Respondent, WIBO, sought to establish before the Commission by engineering testimony that there was a possibility that the interference experienced by the applicant was due to some deficiency in its equipment or operation. The engineer who testified had never seen the equipment nor the station, and stated that he could not judge its efficiency (R. 312, 314, 315). The applicant's engineer testi-

fied that the equipment was in good mechanical condition, and appeared to be in good electrical condition (*supra,* pp. 37–38). Respondent's engineer stated that, in view of the mileage separation between the Syracuse and Gary stations (600 miles), both operating on 1,360 kc with 1,000 watts power, he would expect objectionable interference, due to heterodyne (R. 320). He suggested that antenna improvements sometimes are effective to correct the interference, but without having seen the Gary station he could not say that it was capable of improvement in that respect (R. 321). It is significant that the measures which he proposed were chiefly calculated to increase the effective strength of the station's signal (R. 311), but he stated that the field strength measurements taken by the applicant's engineer gave results better than would be expected from the average 1-kilowatt transmitter (R. 314).

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed, with directions to affirm the order of the Commission.

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APRIL, 1933.

APPENDIX A

The Radio Act of 1927, as amended by the Act of March 28, 1928, and by the Act of July 1, 1930, provides, in part, as follows:

> That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license * * * (c. 169, 44 Stat. 1162, U.S.C., Sup. VI, Title 47, Sec. 81).
>
> SECTION 2. For the purposes of this Act, the United States is divided into five zones, as follows: * * * the fourth zone shall embrace the States of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Kansas, and Missouri; * * * (c. 169, 44 Stat. 1162, U.S.C., Sup. VI, Title 47, Sec. 82).
>
> SECTION 4. Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *
>
> (c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each

individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

* * * * *

(c. 169, 44 Stat. 1163, U.S.C., Sup. VI, Title 47, Sec. 83).

SECTION 9. The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided,* That if and when there is a lack of applications from any

zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located.*

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses (c. 169, 44 Stat. 1166, as amended March 28, 1928, c. 263, 45 Stat. 373; U.S.C. Sup. VI, Title 47, Sec. 89.)

SECTION 11. If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that

*As originally enacted this paragraph of Section 9 provided:

"In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same" (c. 169, 44 Stat., 1166).

public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein. * * * (c. 169, 44 Stat. 1167; U.S.C. Sup. VI, Title 47, Sec. 91.)

SECTION 16. (a) An appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Appeals of the District of Columbia in any of the following cases:

* * * * *

(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license.

* * * * *

(d) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.

* * * * *

(c. 169, 44 Stat. 1169, as amended July 1, 1930, c. 788, 46 Stat. 844; U.S.C. Sup. VI, Title 47, Sec. 96 (a), (3), (d).)

APPENDIX B

General Order No. 102 (R. 1072–1073)

* * * * *

Whereas under the unit and quota figures adopted by the Commission, the First and Second Zones are under-quota and the remaining three zones are over-quota;

And whereas there are a number of states that are over-quota and a number of states that are under-quota;

And whereas there is now pending before the Commission a number of applications from under-quota states which, under the law, are entitled to their pro rata share of radio facilities;

Therefore, in order to bring about an equalization of these radio facilities among the states in the zones, the Commission adopts the following with reference to applications:

1. Where a zone has already in use its pro rata share of facilities, the Commission will not allocate any further radio facilities to that zone, which would increase its quota.

2. Applications from under-quota states in zones which have already allocated to them their pro rata share of radio facilities should be for a facility already in use in that zone by an over-quota state.

3. Likewise, where a state is already over-quota, the Commission will not allocate any further radio

facilities to that state, which would increase its quota.

4. Applications from states which now have their quota, or from states which are over quota, should be for facilities already in use in that state.

5. An applicant from an under-quota state in an under-quota zone may apply either for facilities in use in an over-quota state in that zone or an over-quota state in an over-quota zone.

The further questions of kilocycle and mileage separations should also be considered by an applicant in selecting the frequency to be applied for.

Since the Commission has classified stations in accordance with power into three classes, namely, clear channel, regional, and local stations, and has allocated certain frequencies for the use of each of these three classes of stations, applications should be for frequencies set aside by the Commission for the character of station applied for.

All applications now pending before the Commission which have not been heard or designated for hearing by the Commission may be amended by the applicants to conform to this Order.

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